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Nos. 80-1728, 80-1808 and 81-91

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WOELKE & ROMERO FRAMING, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF AIR CONDITIONING & REFRIGERATION INSTITUTE, AIR MOVEMENT AND CONTROL ASSOCIATION, AMERICAN CONSULTING ENGINEERS COUNCIL, ARCHITECTURAL WOODWORK INSTITUTE, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, AND NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, INC., IN SUPPORT OF THE PETITIONERS

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This brief amicus curiae on behalf of the above-named organizations is submitted with the consent of all parties.[1]

INTEREST OF THE AMICI CURIAE

The associations joining herein have a substantial and longstanding interest in the effective implementation of the statutory prohibitions against secondary boycotts, particularly in the construction industry. Members of the American Consulting Engineers Council (ACEC) and the National Society of Professional Engineers (NSPE) design, specify and provide engineering services on all types of construction projects and therefore have a major role in determining the materials, components and methods to be used in construction. Members of the Air Movement and Control Association (AMCA), the Air Conditioning & Refrigeration Institute (ARI), the Architectural Woodwork Institute (AWI), and the National Woodwork Manufacturers Association (NWMA), manufacture materials and components used in construction throughout the United States. Together, these associations represent a substantial segment of the construction industry.

The amici joining herein have wide experience with the problems in the construction industry resulting from secondary boycotts effectuated through diverse union

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[1] The letters of consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

conduct. As construction industry designers, engineers and manufacturers, the amici are affected directly and substantially by labor and work rule restrictions that reduce the latitude of construction contractors to select the most appropriate methods, materials and components. Accordingly, they have participated individually, jointly and with other industry associations in many cases before the National Labor Relations Board ("NLRB" or "the Board") and the courts in which the interpretation and application of the secondary boycott provisions of the National Labor Relations Act were in issue.[2]

The issues presented for the Court's consideration in these cases are of crucial importance to the amici. Of particular concern is the use of union subcontracting agreements to effectuate product boycotts unrelated to the legitimate interests of unions in setting wage rates and working conditions. The amici are concerned that under the Ninth Circuit's ruling, project owners, architects and engineers will often be left without the option of utilizing prefabricated or factory-assembled components which unions refuse to install, since the general contractors may be barred from dealing with all nonunion subcontractors who are free to install such components.

STATEMENT OF THE CASE

The Ninth Circuit ruling under review[3] addresses two separate cases of secondary conduct which were consolidated at both the NLRB[4] and appellate court levels.

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[2] *E.g., NLRB v. Enterprise Ass'n of Pipefitters, Local 638*, 429 U.S. 507 (1977); *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967).

[3] References herein to the opinion of the limited *en banc* panel of the court of appeals are cited to Appendix A of the petition for certiorari in No. 80-1798.

[4] These two cases, along with several other cases, were initially consolidated for oral argument by the NLRB in 1978. Among the cases was *Donald Schriver, et al. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 2058 (1981).

One case (No. 80-1798) concerns a proposed collective bargaining agreement which two Carpenters Union locals sought to negotiate with a framing subcontractor, Woelke & Romero Framing, Inc. ("Woelke"), after the then-current agreement lapsed. One of the clauses would have forbidden Woelke to subcontract jobsite work except to firms having a current agreement with the Carpenters.[5] Following an impasse in bargaining, the unions picketed Woelke, and workers employed by other subcontractors stopped work on some of the projects in which Woelke was involved.

Upon charges filed by Woelke, the NLRB's General Counsel issued a complaint against the Carpenter's Union locals alleging that they violated Section 8(b)(4)(i) and (ii)(A)[6] of the National Labor Relations Act, *as*

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[5] The proposed clause, reproduced at Cert. Pet. No. 80-1798 App. A at 5 n.4, provides:

> "The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement."

[6] Sections 8(b)(4)(i) and (ii)(A) and (B), 29 U.S.C. § 158(b)(4)(i) and (ii)(A) and (B), provide:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce

amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395), 29 U.S.C. § 151 *et seq.* (1976) (the "Labor Act"), by picketing Woelke at various jobsites with an object of forcing it to enter into an agreement prohibited by Section 8(e)[7] of the Labor Act. The case was submitted to the NLRB upon a stipulation of facts and the Board held that the construction industry proviso to Section 8(e) protected the proposed subcontracting agreement and that the picketing designed to secure acceptance of the clause did not violate Section 8(b)(4). 239 N.L.R.B. 241 (1978).

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or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . ."

[7] Section 8(e), 29 U.S.C. § 158(e), provides in pertinent part:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work. . . ."

The second case (Nos. 80-1808 and 81-91) emanates from a collective bargaining agreement negotiated by an Engineers Union local and a chapter of the Associated General Contractors (AGC). The agreement precluded AGC employers from assigning work to any subcontractor not having a current agreement with the Union.[8] Upon charges filed by a chapter of the Associated Builders and Contractors (A.B. & C.), the General Counsel issued a complaint alleging that the subcontracting restriction violated Section 8(e) of the Labor Act. The NLRB upheld the legality of the clause but struck down a self-enforcement provision which allowed the union to strike or picket to enforce the subcontractor clause. 239 N.L.R.B. 274 (1978).

The cases were subsequently consolidated for review in the Ninth Circuit, where a three-judge panel initially reversed the Board in material part and sustained the employers' petitions for review. 609 F.2d 1341 (9th Cir. 1979). Thereafter, the court of appeals granted petitions for rehearing *en banc* and ordered the matters reheard before a limited *en banc* panel as provided by statute and local rule. On April 17, 1981, the limited *en banc* panel of the Ninth Circuit issued its opinion and judgment affirming the decisions and orders of the Board. Cert. Pet. No. 80-1798 App. A.

SUMMARY OF ARGUMENT

The amici submit that the decision of the Ninth Circuit permits a form of union conduct which Congress sought to prohibit through the secondary boycott and hot cargo restrictions in Sections 8(b)(4) and 8(e) of the

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[8] The restrictive clause, reproduced at Cert. Pet. No. 80-1798 App. A at 2, reads in pertinent part:

> "Employers shall not contract any work covered by this Agreement to be done at the site of the construction . . . to any person, firm, or company who does not have an existing labor agreement with the Union covering such work."

Labor Act. The court of appeals' conclusion that a construction industry subcontracting clause, plainly secondary in scope and effect, is lawful merely because it is promoted within the context of a collective bargaining relationship has no basis either in the statute or in its legislative history. Rather, the thrust of the Act's secondary boycott provisions, previously recognized by the Ninth Circuit itself in *Acco Construction Equipment, Inc. v. NLRB*, 511 F.2d 848 (9th Cir. 1975), is to proscribe restrictive subcontracting clauses whenever they extend beyond particular jobsites or are effective whether or not employees of the contractor are engaged in *bona fide* work at the site. The limited *en banc* panel's obvious reliance on the District of Columbia Circuit's lengthy opinion in *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 2058 (1981), to overturn the initial panel decision in this case, is sorely misplaced. The D.C. Circuit's opinion, as reflected in the opinion of the limited *en banc* opinion here, is grounded upon bits and pieces of legislative history, taken out of context and supported by fallacious *post hoc* reasoning.

The Ninth Circuit's decision is equally troublesome for its failure to acknowledge and to apply interrelated principles of federal labor and antitrust law proscribing plainly anticompetitive activities. In *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 613 (1967), this Court noted that Congress had intended Section 8(b)(4) to serve the dual objectives of preserving the right of labor organizations to bring pressure to bear on employers in primary labor disputes and of shielding neutral employers from pressures in controversies not their own. 386 U.S. at 626-27, *citing NLRB v. Denver Building & Construction Trades*, 341 U.S. 675 (1951). Thereafter, this Court in *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975), cautioned that a proper accommodation of labor and antitrust principles requires that the construction industry proviso to

Section 8(e) be given limited scope. The subcontracting clauses here under review "indiscriminately exclude[d] nonunion subcontractors from a portion of the market," 421 U.S. at 624, and thus violate the spirit, if not the letter of these cases.

Accordingly, we join in the arguments advanced by the petitioners that the union signatory subcontracting provisions here challenged violate the secondary boycott prohibitions of the Labor Act. The decision of the limited *en banc* panel, if allowed to stand, would threaten competition based upon efficiency of operation and technology in the construction industry. Specifically, it would allow unions to compel general contractors to cease doing business with, or otherwise bring pressure upon, subcontractors, engineers, architects and others involved in construction projects on the basis of union status, even where different jobsites are concerned. The result would be to extend to an unnecessary and unwarranted degree the restrictive job rules and work practices which typify union construction, with the concomitant effect of curtailing the use of prefabricated and factory-assembled products and components and forcing resort to inefficient jobsite methods.

ARGUMENT

THE UNION SIGNATORY SUBCONTRACTING AGREEMENTS ARE NOT PRIVILEGED BY THE CONSTRUCTION INDUSTRY PROVISO TO SECTION 8(e) BECAUSE THEY EXTEND BEYOND PARTICULAR JOBSITES AND ARE EFFECTIVE WHETHER OR NOT EMPLOYEES OF THE CONTRACTOR ARE ENGAGED IN *BONA FIDE* WORK AT THE JOBSITE

A. Introduction

The restrictive subcontracting agreements here under review compel the signatory contractor never to engage any nonunion subcontractor—or, for that matter, any subcontractor who is not signatory to an agreement with a *particular* union—to work on any construction site, regardless of whether the contractor has employees of his own working there. It is widely recognized that such agreements tend to foreclose from the competitive construction market nonunion contractors who are able to employ efficient methods and innovative products, processes and techniques.[9] Indeed, their ultimate effect is to strengthen the impact of the restrictive work rules and jurisdictional limitations that characterize unionized construction, thus aggravating the inflationary environment that particularly plagues this industry, to the detriment of the American public.[10]

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[9] The capability of construction craft unions to bargain so as to restrict materials and processes has long been recognized and criticized by commentators. See Note, *Factory-Built Housing: Statutory Solutions*, 38 U. Chi. L. Rev. 788, 805-06 (1971); Note, *Union Restrictions on the Use of Prefabrication in the Housing Industry*, 55 Iowa L. Rev. 270, 278 (1969) ("Through the use of sections 8(b)(4)(B) and 8(e) and by utilizing the construction industry proviso, unions possess the power to exert economic pressure on the employer-contractor not to use new labor-saving devices"); Petro, *Unions, Housing Costs, and the National Labor Policy*, 32 Law & Contem. Prob. 319 (1967).

[10] According to an analysis published by the Department of Commerce, the poor labor productivity record of the construction

Through enactment of the secondary boycott provisions of Section 8(b)(4) and Section 8(e)'s prohibition against "hot cargo" agreements, Congress has specifically sought to eliminate the market restraints imposed by such restrictive practices. The Ninth Circuit's failure to acknowledge the full import of the statutory scheme and declare the subcontracting clauses here under review unlawful, we submit, requires that this aspect of its decision be reversed.

B. The Construction Industry Proviso Does Not Protect Union Signatory Subcontracting Agreements Not Tied Directly To Alleviating Jobsite Friction Between Union and Nonunion Workers

Having initially determined that the subcontracting clauses here involved were secondary and therefore within the scope of Section 8(e),[11] the Ninth Circuit proceeded to address whether the clauses nevertheless were exempted from that section's proscription by the con-

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industry in recent years has resulted in a serious rise in unit labor costs, which exceeds even the increase in the Department of Commerce Composite Construction Cost Index. MacAuley, *Economic Trends in the Construction Industry, 1965-80*, Construction Review 15 (Dept. of Commerce May-June 1981). A table calculating the index of unit labor costs for construction workers, 1965-80, is reproduced in the appendix to this brief, *infra* p. 1a.

Subcontracting accounted for approximately 30% of the construction work done in 1977. Construction Review, *supra* at 7.

[11] The Ninth Circuit's conclusion that the subcontracting clauses are secondary in objective, within the meaning of *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612 (1967), plainly is correct. The court's apologia for applying secondary boycott principles to the construction industry, however, is both inappropriate and unwarranted. Although the court properly acknowledged its obligation to adhere to the primary-secondary distinction between secondary employers working the same jobsite in the construction industry, *NLRB v. Denver Building & Construction Trades*, 341 U.S. 671 (1975), it eschewed the opportunity to ground its decision as well upon compelling practicalities supporting its result. See Part D of this Argument, *infra*.

struction industry proviso. Apparently taking its cue from the earlier District of Columbia Circuit's opinion in *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 2058 (1981), which parallels the opinion here in both its analytical framework and result, the Ninth Circuit concluded that Congress had fashioned the proviso to "preserve the pattern of collective bargaining in the construction industry," and, accordingly, sought to uncover the pre-1959 pattern. 635 F.2d at 879; Cert. Pet. No. 80-1798, App. A at 17. On the basis of nothing more than several opaque remarks of Senator Kennedy during legislative debate,[12] and a study of pre-1959 construction subcontracting clauses, which had been dismissed by the Board's General Counsel as inconclusive,[13] the Ninth Circuit declared such restrictive agreements within the "pattern" Congress sought to preserve. In so doing, it reversed itself [14] and disregarded law of its own circuit,[15] other cir-

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[12] Cert. Pet. No. 80-1798, App. A at 18-19. This Court has repeatedly cautioned against relying upon the expressed views of an individual congressman in the course of legislative debate to ascertain Congressional intent. See *United States v. UMW*, 330 U.S. 258, 282 (1946); *Duplex Co. v. Deering*, 254 U.S. 443, 474 (1920).

[13] Cert. Pet. No. 80-1798, App. A at 20-21, *citing* Lunden, *Subcontracting Clauses in Major Contracts*, 84 Mon. Lab. Rev. 579 (pt. I), 715 (pt. II) (1961). For criticism of the Lunden study's methodology, see Office of the General Counsel Memorandum 76-57, December 15, 1976, *reprinted in* Labor Relations Yearbook 1976, 295, 308-09.

[14] In its initial inquiry into the proviso's purpose, a panel of the Ninth Circuit construed the proviso as one designed to minimize jobsite tension. 609 F.2d 1341, 1349. Because the agreements operated even when no union workers were at the jobsite, they exceeded the purpose of the proviso. The panel added that its holding preserved the section 7 rights of workers to engage in or refrain from union activity. *Id.* In order to protect those rights, it was necessary to restrict the top-down organizing potential of subcontracting agreements. *Id.* at 1350.

[15] *Acco Construction Equipment, Inc. v. NLRB*, 511 F.2d 848, 851 (9th Cir. 1975) (underlying congressional concern to minimize

cuits,[16] and a well-reasoned memorandum previously issued by the General Counsel,[17] all indicating that the proviso encompasses only union signatory subcontracting clauses designed exclusively to alleviate jobsite tension that arises when union and nonunion personnel work together at the same construction site.

In fact, the legislative history of the 1959 Act reflects only a Congressional intent to preserve pre-1959 *law*. H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39 (1959), *reprinted in* I Legislative History of the LMRDA of 1959, 942 ("Legislative History"). For, as acknowledged even by a commentator supporting the Ninth Circuit

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jobsite tension); *Associated General Contractors of Cal., Inc. v. NLRB*, 514 F.2d 433, 439 (9th Cir. 1975) ("The construction industry proviso was designed to enable employers and unions to prevent friction between union and nonunion employees on the same jobsite").

[16] *Essex County & Vic. Dist. Council of Carpenters v. NLRB*, 332 F.2d 634 (3d Cir. 1964) (proviso granted to deal with problem of craft unionists working alongside nonunion men), *cited with approval in National Woodwork Manufacturer Ass'n v. NLRB*, 386 U.S. 612, 639, n.32 (1967); *International Union of Operating Engineers Local 542 (York County Bridge, Inc.)*, 216 N.L.R.B. No. 67, 88 L.R.R.M. 1405, 1407 (1975), *enf'd*, 532 F.2d 902 (3d Cir. 1976) (the proviso "was intended to prevent labor strife among nonunion and union employees at the same jobsite"). Until *Schriver*, the law of the D.C. Circuit was to the same effect. *Drivers, Salesmen, Etc., Local 695, v. NLRB*, 361 F.2d 547, 555 (D.C. Cir. 1966).

[17] The General Counsel analyzed various types of subcontracting restrictions in light of this Court's decision in *Connell*. The General Counsel concluded that clauses extending to jobsites where the signatory contractor does not use any employees of his own, or to phases of construction when the signatory's employees would not be present, are "broader than required by the union's legitimate interests" and, therefore, "are not within the scope of the proviso." Office of the General Counsel Memorandum 76-57, *supra* note 13 at 301-02. The General Counsel's office was, of course, required to abandon this interpretation of the proviso when the Board issued its contrary holding in these cases.

result, "construction practices prior to the 1959 amendments *reveal no pattern.*" Comment, *The Scope of Hot Cargo Agreements in the Construction Industry*, 69 Geo. L.J. 1309, 1323 (1981) (emphasis added). Furthermore, a brief review of the overall Congressional approach to construction labor relations reveals that the Ninth Circuit's rationale defeats almost entirely Congress' unique scheme for restricting secondary activity in the industry.

The Congressional intent embodied in the construction industry proviso can be gleaned most clearly from its comparison with the other industry-excluding proviso in Section 8(e), which concerns the garment industry.[18] The legislative history of the garment industry proviso plainly shows "it was designed to allow secondary pressures to counteract the effects of sweatshop conditions in an industry with a highly integrated process of production between jobbers, manufacturers, contractors and subcontractors." *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. at 638. In drafting the garment industry proviso, Congress demonstrated clearly an intent to negate Section 8(e)—and, perforce, Section 8(b)(4)(B). The sharp distinction in its approach to the construction industry, wherein reference is made to the construction site by use of the definite article,[19] establishes an inten-

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[18] The garment industry proviso, 29 U.S.C. § 158(e) (1976), reads:

> "*Provided further*, that for the purposes of this subsection (e) and section 8(b)(4)(B) the terms 'any employer,' 'any person engaged in commerce or an industry affecting commerce,' and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer,' 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry:"

[19] The D.C. Circuit in *Donald Schriver, Inc. v. NLRB*, 635 F.2d at 877, suggested that its open-ended reading of the construction industry proviso was supported, in part, by its "literal wording."

tion to provide therein "only a fragmentary exclusion from the reach of Section 8(e)." Petro, *supra* note 9, at 344. *Cf. Connell Construction Co. v. Plumbers Local 100* 421 U.S. 616, 628. To interpret the construction industry proviso, in practical effect, almost as broadly as the garment industry proviso plainly frustrates Section 8(e)'s design.

Further support for a reading of the construction industry proviso that limits subcontracting restrictions to instances of potential jobsite friction is derived from Section 8(f) of the Labor Act.[20] That section makes law-

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To the contrary, however, had Congress not been motivated by the need to avoid union-nonunion jobsite friction at "*the* site of *the* construction," it could easily have employed the indefinite article ("a site of construction") to clarify permitting the proviso to be used as a broad organizational weapon. (Emphasis added.)

[20] Section 8(f), 29 U.S.C. § 158(f) (1976), reads as follows:

"(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the

ful a collective bargaining agreement in the construction industry notwithstanding that the signatory union has not achieved majority status. But as this Court declared in *NLRB v. Iron Workers Local 103*, 434 U.S. 335, 345 (1978), "[t]he employer's duty to bargain and honor the contract is contingent on the union's attaining majority support at the various construction sites." In ruling that the union violated Section 8(b)(7)[21] in that case when it extended picketing to enforce a prehire agreement without a showing of majority support, this Court's opinion demonstrated the consistent commands of the Labor Act that union activity aimed at expanding its control be tied to the direct, legitimate and *demonstrable* interests of its identifiable members, even in the construction industry. "Congressional concern about coerced designation of bargaining units," this Court declared, "did not evaporate as the focus turned to the construction industry. . . ." 434 U.S. at 347-48.

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final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."

[21] Section 8(b)(7), 29 U.S.C. § 158(b)(7) (1976), places several restrictions upon primary recognitional picketing. In *Donald Schriver, Inc. v. NLRB*, 635 F.2d at 876, the D.C. Circuit ruled that unions may picket, within the confines to Section 8(b)(7), to obtain a pre-hire agreement containing a hot cargo clause and still be within the protection of the construction industry proviso. The effect of this ruling is to create an unlimited secondary weapon. As several commentators have observed, under the D.C. Circuit's ruling, "a union [may] demand a hot cargo agreement from an employer with whom there was no pre-existing relationship of any kind—*as long as* the union ostensibly aims to represent the employer's workers." Dereshinsky, Berkowitz & Miscimarra, The NLRB and Secondary Boycotts 309 n.331 (rev. ed. 1981) (emphasis in original).

C. The Ninth Circuit's Interpretation Of The Construction Industry Proviso Is Contrary To The Spirit, If Not The Letter, Of *Connell*

In *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975), a construction industry union sought to obtain from a general contractor with whom it had no collective bargaining relationship an agreement to subcontract only to union subcontractors. Since this Court determined that such agreements were valid only when negotiated within the context of a collective bargaining relationship, 421 U.S. at 633, it had no occasion to rule specifically that the defendant's restrictive subcontracting agreement was unlawful on the ground that it was not confined to "common situs relationships on particular jobsites as well." *Id.* But, after explaining that the construction industry proviso was adopted by Congress as a compromise between those legislators who wanted Section 8(e) to ban all hot cargo and those who wanted the provision only to prohibit agreements in the trucking industry, this Court emphasized that Section 8(e)'s legislative history revealed an intention to give the proviso only limited application:

> "Discussion of 'special problems' in the Construction industry . . . focused on the problems of picketing a single nonunion subcontractor on a multiemployer building project, and the close relationship between the contractors and subcontractors at the jobsite. Congress limited the construction industry proviso to that single situation, allowing subcontracting agreements only in relation to work done on a jobsite. In contrast to the latitude it provided in the garment industry proviso, Congress did not afford construction unions an exemption from § 8(b)(4)(B) or otherwise indicate that they were free to use subcontracting agreements as a broad organizational weapon."

421 U.S. at 629-30 (footnote omitted).

The Ninth Circuit's opinion "concede[s] at the outset that the *Connell* opinion contains considerable em-

phasis on problems of shoulder-to-shoulder friction between union and nonunion workers at the jobsite, and additional emphasis on antagonism of the 1959 Congress to 'top-down' organizing that is one of the effects of subcontractor agreements." Cert. Pet. No. 80-1798 App. A at 23. The circuit opinion, however, goes on to reject summarily any application of those concerns to the case at bar. In so doing, we submit, the Ninth Circuit exposed its fundamental misapprehension of *Connell*. This Court's view of the construction industry proviso and its relationship to the entire scheme of the Labor Act was not a gratuitous exercise, signifying nothing. Therein, in fact, lies the overriding rationale of *Connell*: ". . . to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees." 421 U.S. at 632.[22]

Connell teaches that a proper accommodation of federal labor and antitrust policies requires that the construction industry proviso be given limited scope. It protects jobsite subcontracting restrictions only to the extent that they relate to legitimate union interests growing out of circumstances unique to the construction industry. This Court did not undertake to define in *Connell* precisely what union interests qualify for this protection, but the focus of the Court's discussion was upon the

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[22] As one commentator has noted, *Connell* "seems to leave little room for any top-down organizational impact in its analysis of the proviso's purpose. The Court not only implied that the proviso was designed primarily to permit the avoidance of work stoppages due to *Denver Building Trades* problems, but also emphasized that section 8(f) was the only consideration given to construction unions seeking to widen their base." Note, *Hot-Cargo Agreements in the Construction Industry: Restraints on Subcontracting Under the Proviso to Section 8(e)*, 1981 Duke L.J. 141, 179. Even in criticizing the *Connell* decision, the author conceded that *Connell* "might imply" a denial of proviso protection to a subcontracting agreement with a vast potential, intended or not, to organize from the top down. *Id.*

concerns expressed in Congressional debates preceding Section 8(e)'s enactment about "the frictions that may arise when union men work continuously alongside nonunion men on the same construction site." 421 U.S. at 631, quoting from *Drivers Local 695 v. NLRB*, 361 F.2d 547, 557 (D.C. Cir. 1966). Thus, it is clear that subcontracting restrictions which go no farther than is necessary to prevent such possible jobsite friction—i.e., collectively bargained agreements which do no more than bar the signatory contractor from engaging nonunion firms to work on jobsites where his unionized employees are currently working—are protected by the proviso even though they entail some restraint on competition and efficiency. But by the same token, subcontracting restrictions not so limited—*i.e.* restrictions which multiply anticompetitive pressures without a corresponding justification based upon legitimate union concerns, such as the agreements challenged in this case—are not protected.

D. To Permit Restrictive Subcontracting Agreements Solely on the Basis of a Collective Bargaining Relationship Would Unjustifiably Threaten Competition Based Upon Efficiency of Operation and Technology in the Construction Industry

The Court has recognized that national labor policy requires tolerance for the lessening of business competition only on the basis of legitimate union objectives. *UMW v. Pennington*, 381 U.S. 657 (1965); *Meat Cutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676 (1965). The restrictive agreements here under review not only are unjustifiable on such grounds, but they present serious barriers to the development and maintenance of an economically-sound construction industry. If allowed to stand, the court of appeals' holding that Section 8(e) permits unions in the construction industry to force *any* contractor with whom they have any sort of bargaining relationship to agree not to do business at *any* site at *any*

time with *any* subcontractor whose employees have chosen the "wrong" union,[23] or no union, will seriously endanger not only employee freedom of choice[24] in the construction industry, but also the survival of competition based upon efficiency of operation and technology. Certainly after *Connell*, 421 U.S. at 623, it should be plain that where union signatory agreements are concerned, this Court intends that the Board and the courts look beyond the facade of collective bargaining and also measure the magnitude of the restraint on the product market.[25]

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[23] The Ninth Circuit's decision explicitly endorses restrictive clauses requiring a collective bargaining agreement with a particular union. Cert. Pet. No. 80-1798, App. A at 39.

[24] The Ninth Circuit's ruling plainly has the effect of restricting the rights of the employees of neutral nonunion subcontractors to choose freely whether to organize. Knowing that their employer will lose eligibility to bid on contracts with the signatory general contractor on the basis of their nonunion status, they are thus compelled to adopt unionization from the "top-down" for purposes completely distinct from those which may emanate from relationships with their own employer.

[25] Additional evidence of the anti-competitive nature of these restrictive subcontracting agreements can be ascertained when such agreements are measured against the substantial body of law prohibiting shelter for union agreements and practices that violate federal antitrust laws. As far back as *Allen Bradley Co. v. Electrical Workers Local 3*, 325 U.S. 797 (1945), this Court held that a union-induced employer's concerted refusal to deal was a violation of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-8, *as amended*, 15 U.S.C.A. §§ 1-7, 15, despite the direct effect of the agreement on employees' wages and working conditions. In *Connell*, this Court made clear that other adjudicatory bodies may consider and decide matters arguably implicating the Labor Act where such matters arise in the context of a possible federal antitrust violation. 421 U.S. at 626. Particularly relevant to the cases here under review is *In re Teamsters Local 959*, 93 F.T.C. 739 (1979), wherein the Federal Trade Commission attacked subcontracting agreements on antitrust grounds. The consent order required, among other things, an Anchorage, Alaska labor union local to cease entering into agreements which require signatory construction companies to deal only with subcontractors who agree with the same

Restrictive subcontracting agreements of the sort involved in these cases are, by their very nature, secondary and anticompetitive devices. Their entire purpose is to exclude nonunion subcontractors from a portion of the competitive construction market. But their ultimate effect on efficiency and productivity in the industry involves much more than just the elimination of *subcontractors* from the competition. For in the process, they also effectively eliminate many efficient *methods* and innovative *products* from use in construction. By strengthening the impact of the restrictive work rules and jurisdictional limitations that characterize unionized construction, such agreements aggravate the inflationary environment that particularly plagues this industry, to the detriment of the national economy.

The members of the associations joining in this brief know from long experience that the anticompetitive impact of broad subcontracting restrictions, like the ones involved in these cases, inevitably extends far beyond competition based on wages and working conditions. For a construction contractor who agrees to deal only with unionized subcontractors thereby subscribes not only to union-approved wage rates and working conditions, but also, almost invariably, to an elaborate set of restrictions upon the methods, materials and components that may be used on any project where it is engaged. When applied during the course of a construction project, these restrictions impose severe limitations on the ability of the project owners, designers and general contractors to utilize the methods they deem most desirable for the particular job.[26]

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terms and conditions binding between the union and the contractors. The order explicitly allowed § 8(e) agreements "as long as said agreement is only effective when a member of the bargaining unit represented by respondent is employed and currently working at the site of the construction, alteration, painting or repair of the building, or other work." 93 F.T.C. at 742.

[26] The importance of the proviso to unions is that, among other things, it permits them to coerce employers not to handle pre-

Were it possible for the nonunion subcontractor to challenge these anticompetitive union signatory rules where the requirements of *Connell* are not met, the restrictions upon neutral subcontrators in their selection of materials might be less onerous. What is particularly grevious about the lower court's decision, however, is that, if it is enforced, in the vast majority of cases the nonunion subcontractor would have no opportunity under the Labor Act to challenge the *bona fides* of the restrictive work practices. Thus, a nonunion contractor who becomes involved in a dispute over the application of a subcontracting clause often is bound by the substance and procedure of the grievance machinery contained in the agreement between the general contractor and the union. Contract grievances in the construction industry most often are heard by a panel composed of an equal number of unionized employer and union representatives. Since the unionized contractors are burdened by the provisions imposed by their collective bargaining agreement, their interest in seeing that subcontractors fully comply with the terms of the agreement is no less than that of the unions. Thus, the issues typically are decided by a panel in which the nonunion subcontractor is without representation. Moreover, the panel decision is binding as law upon covered employers and enforceable in court. *Cf. United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). The standard for review of a grievance committee decision is narrow, and the courts will not ordinarily evaluate the merits of the decision.

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fabricated products on the jobsite even when their objectives are plainly secondary. An open-ended reading of the proviso, of course, would make this practice virtually unlimited.

Expanded use of prefabricated techniques in the building industry offers an opportunity for reducing the cost of housing construction. Precutting materials in the factory to be assembled on the jobsite or manufacturing an entire housing unit in sections which will be erected on the jobsite offer substantial saving in both materials and labor. *See generally* the law review articles cited in note 9, *supra*.

Safeway Stores v. American Baking & Confectionary Workers Local 111, 390 F.2d 79, 82 (5th Cir. 1968). See Moeller, Jr., *Employee Rights and Antitrust Liability: Organized Labor's Exemption After Connell*, 48 Miss. L.J. 713 (1977).

In sum, only a strict reading of the proviso that limits the applicability of restrictive subcontracting agreements to jobsites where union-nonunion friction is possible accommodates the important public interest favoring competition based on efficiency in construction, while still protecting the interest of building trade unions in preserving jobsite peace. Accordingly, the restrictive agreements here under review should be declared unlawful specifically on the ground that they extend beyond particular jobsites and are effective whether or not employees of the contractor are engaged in *bona fide* work at the site.[27]

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[27] The Ninth Circuit upheld the Board's determination in Nos. 80-1808 and 81-91 that the subcontracting provision ultimately was not protected by the Section 8(e) construction industry proviso because of the collective bargaining agreement's "self-enforcement" provisions. Cert. Pet. No. 80-1798 App. A at 41-43. Under this provision, the parties were authorized to take "any action deemed necessary" to enforce an established grievance arbitration procedure, which would cover disputes concerning restrictive subcontracting. Because Congress expressly indicated that agreements saved by the proviso could not be enforced by conduct violative of Section 8(b)(4), I *Legislative History*, *supra* at 943, this conclusion plainly is correct.

CONCLUSION

For the foregoing reasons, and those advanced in the briefs of the several petitioners, we submit that the judgment of the limited *en banc* panel of the Ninth Circuit be reversed with instructions to remand the cases to the Board to have these subcontracting agreements declared unlawful on the ground that they extend beyond particular jobsites and are effective whether or not employees of the contractor are engaged in *bona fide* work at the jobsite.

Respectfully submitted,

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Table 9.—Calculation of Index of Unit Labor Costs for Construction Workers, 1965-80

	(a)	(b)	(c)	(d)	(e)
Year	Construction workers		Productivity of construction workers		Index of unit labor costs (b÷d) (1965=100)
	Average hourly earnings (Current dollars)	Index of average hourly earnings (1965=100)	Output per hour worked by all persons (1972 dollars)	Index of output per hour worked by all persons (1965=100)	
1965	$3.71	100	$8.64	100.0	100
1966	3.81	103	8.21	97.0	106
1967	4.11	111	8.11	95.9	116
1968	4.41	119	8.42	99.5	120
1969	4.79	129	7.78	92.0	140
1970	5.24	141	7.66	90.5	156
1971	5.69	180	8.18	96.7	186
1972	6.06	163	8.15	96.3	169
1973	6.41	173	7.90	91.0	190
1974	6.81	184	7.02	83.0	222
1975	7.31	197	7.23	85.5	230
1976	7.71	208	7.30	86.3	241
1977	8.10	218	7.60	89.8	243
1978	8.66	233	7.27	85.9	271
1979	9.27	250	6.76	79.9	313
1980	9.94	268	n.a.	n.a.	n.a.
	Percent change				
1965-79	+150	+150	−20	−20	+213

n.a.—Not yet available.

Source: Calculated by Bureau of Industrial Economics (BIE) from data developed by the Bureau of Labor Statistics and the Bureau of Economic Analysis.